IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 279

HENRY LUSTIG, E. ALLAN LUSTIG and JOSEPH SOBEL,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

PETITIONERS' REPLY BRIEF

NATHAN L. MILLER,
J. BERTRAM WEGMAN,
Attorneys for Petitioners.

RICHARD J. BURKE,
With them on the Brief.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 279

HENRY LUSTIG, E. ALLAN LUSTIG and JOSEPH SOBEL,

Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

PETITIONERS' REPLY BRIEF

The Petitioners do not seek a review of concurrent findings of fact by the lower Courts as the Government professes to suppose for want of any answer to the reasons for granting the writ stated in the petition.

They do seek a review of questions of law raised by the refusal of the Trial Court to submit the only contested questions of fact in a criminal case to the jury.

The Government does not deny the public importance of those questions or that they are precisely the type of questions which this Court will take up by certiorari. If the Trial Court erred in refusing to submit the disputes of fact to the jury, its error could not be cured by any post-trial findings.

The Government would substitute a Court's post-trial determination of disputed facts for the verdict of a jury in a criminal case.

The Circuit Court of Appeals decided:

(1) that "the compromise statute affords no shield to one who has violated the tax laws unless there has actually been a compromise. * * * There was no issue of fact for court or jury as to whether a contract of compromise had been made. Accordingly there is no merit in the defense of immunity" (R. 2199-2200). It did not decide that there was no issue of fact as to whether the disclosure preceded the investigation and was made under a promise of immunity. On that point it held—

(2) that "the question whether the disclosure preceded the investigation and was made under a promise of immunity * * * was one of the admissibility of evidence" (R. 2198), although the Government has never contended that the issue of immunity is not a jury question.

The opinion below thus holds that the Court alone, and not the jury, should pass upon evidence showing a promise of immunity and compliance by a defendant with its terms.

It said "The correctness of the findings of fact objected to depended, so far as not already discussed, upon conflicting testimony or inferences therefrom. The findings so far as material cannot be regarded as clearly erroneous" (R. 2200-2201).

Neither of the Courts below decided that there was no evidence to sustain the Petitioners' contentions. The District Court did not refuse for lack of evidence to submit to the jury the question whether there had been a disclosure before investigation in reliance on the Treasury policy, but, on the assumption that there had been such a disclosure, squarely ruled that the Treasury was not bound by its promise and, solely on that ground, declined to submit the only contested issue of fact to the jury (Petition, p. 6).

It did not refuse the requested charge, in respect of whether the Petitioners were induced to confess their wrongdoing by the promise of immunity, because that was a question for the Court, but because it feared the submission of the question to the jury might harm the Petitioners (*id.* p. 6).

Concurrent findings by the lower Courts of questions of fact after the trial could not cure errors in refusing to submit them to the jury. The Circuit Court of Appeals actually decided the case on questions of law as above, thus confirming the ruling of the Trial Court that the Treasury Department was not bound by its promise even though the Petitioners had made disclosure before investigation in reliance upon that promise.

The Government brief inferentially concedes that whether there was a disclosure on March 26, 1945, to Collector Pedrick was a question of fact by attacking E. Allan Lustig's credibility (pp. 19-20) and by discussing the evidence claimed to be in contradiction of his testimony, even the testimony of alibi witnesses depending on a matter of minutes (pp. 20-23), without saying a word about the corroborating testimony of credible witnesses and the very strong corroboration by the facts and circumstances.

It discusses the testimony of a handwriting expert denying the authenticity of Exhibit SS, E. Allan Lustig's letter of March 24, 1945, to Collector Pedrick (pp. 21-22), without mentioning the fact that that testimony was completely discredited.

In recounting E. Allan Lustig's disclosure to Collector Pedrick on March 26, 1945, the Government fails to mention the testimony that the Collector said this "took the criminal aspect out of the case and made it a civil case, there might be civil penalties but there are no criminal penalties when you come in in a case of this sort" (R. 1110).

It says (p. 15) that on March 27th "McQuillan requested various tax returns pertaining to the case", but does not

mention the fact that that was the day following the disclosure testified to by E. Allan Lustig. A reference to the record cited (R. 2080) will disclose in any event that he merely asked for information as to the filing of returns by Henry Lustig, whose returns are not involved, and three of the seven corporate taxpayers.

It says that McQuillan informed counsel for the Petitioners on April 26, 1945, that they were "too late" (p. 16), but omits to state that he was flatly contradicted by Mr. Oestreicher (R. 959-960). Again at page 22, the Government brief adds that Oestreicher was told by Scanlon on May 15th that the disclosure was too late, but again the Government omits to state that this was flatly contradicted by Oestreicher, and that Scanlon, although present throughout the trial, did not even take the witness stand.

It says that the Circuit Court of Appeals thought it "clear" that "the investigation began at the latest on March 24, 1945" (p. 27). That statement was obviously based on the memorandum of that date transmitting to McQuillan the report of bank deposits to the Treasury by the Federal Reserve Bank (Ex. 333, R. 2076), which deposits the Petitioners knew would be reported when they were made.

It ignores the evidence that no request was ever made of Collector Pedrick for the corporate tax returns, that the only investigation made prior to April 25, 1945, was to confirm the fact of the bank deposits by checking at the Federal Reserve Bank and the depositary banks, and that the only investigation of the corporate tax frauds ever made was begun by Diehl on May 14, 1945, pursuant to the disclosure letters of April 25th (Petition, pp. 11, 13).

It disregards the authoritative definition by Chief Counsel Wenchel of the meaning of the "beginning of an investigation" under the disclosure policy, quoted in the Appendix to the Petitioners' brief annexed to the petition, and Mr. Wenchel's testimony at the trial (R. 1559-1560).

The question when the investigation began was plainly a question of fact for the jury.

The Government emphasizes the finding of the District Court that the currency re-deposits were prompted by the fear of some Government action (p. 26) without reference to Finding 23 (R. 2178) that the disclosure was brought about solely by the knowledge that the re-deposits would lead to a discovery of the tax frauds, a finding which discloses the fundamentally erroneous view of the District Court that the disclosure was induced by fear, and therefore not by a promise of immunity.

It says that on April 18, 1945, Examiner Diehl "was assigned to the Lustig matter" and that on May 14, 1945, "he appeared at the offices of the Lustig companies and started on an examination of their books", thus creating the impression that Diehl's investigation of the tax frauds was wholly independent of any disclosure; but it does not mention the undisputed facts that on April 18th Diehl was given only Henry Lustig's individual return to examine, that the examination of the corporate books begun by him on May 14th was solely under and pursuant to the disclosure letters of April 25th, that his examination confirmed the correctness of Sobel's computations of the understatements of corporate income which the Circuit Court of Appeals said were given to Collector Pedrick on April 25th, and that there is no pretense that the corporate returns were ever requested or procured by any investigator or were ever examined in the investigation of any tax frauds except by Diehl pursuant to said April 25th letters.

Finally the Government is driven to claim (p. 31) that the jury were permitted to consider the disclosure evidence on the question of intent to defraud the revenue in filing false tax returns, which it admits was not disputed (p. 32). The Circuit Court of Appeals paid no attention to that claim.

The Government says that under that charge the jury might have acquitted the Petitioners on three of the twenty-three counts of the indictment. The jury could not be expected thus to discriminate on an issue that was not in

dispute in respect of any of the counts. Their recommendation of clemency plainly indicates that they thought the Treasury had broken its promise.

Intent to defraud and intent to make disclosure of the fraud committed are quite different questions of intent. The submission of evidence on the uncontested issue of intent to defraud could not cure the error in instructing the jury that they could not consider the evidence on the contested issue of intent to make full disclosure.

In its argument it attempts to dispose of questions of law on the ground that this Court will not review the post-trial findings of fact by the District Court concurred in by the Circuit Court of Appeals (pp. 26-29).

The Petitioners are not asking for a review of those findings of fact. They are invoking their constitutional right to have those contested questions of fact submitted to a jury.

The Government attempts to dispose of the constitutional question of due process and self-incrimination on the grounds, (a) that "the admissibility of evidence is within the exclusive province of the trial judge", which no one disputes, (b) that "the evidence could have been obtained through the use of legal process", without any claim that it was so obtained and much of the evidence disclosed, notably Sobel's computations of the understatements of income and the explanation of precisely how such understatements were made, could not have been obtained by legal process, and (c) that the Trial Court submitted the disclosure evidence to the jury on the question of intent to defraud the revenue in filing false tax returns, which intent to defraud was not disputed in respect of any of the counts.

The Government does not question a single statement made in the petition, except to say "petitioners' reference to their April 25 letters as 'confessions, unique for frankness and completeness' (Pet. 27), involves not so much hyperbole as irony". The reference was to the full and detailed disclosure pursuant to those letters. It was estab-

lished by the one person who knew, no other than Examiner Diehl himself (Petition, p. 11).

The Government's partial and inaccurate statement of evidence is alone sufficient to show that there was a question of fact for the jury.

Although its entire argument on the question of immunity is that the District Court found post-trial that there had been no disclosure before investigation and that the Circuit Court of Appeals concurred, it admits in a note that the Trial Court charged the jury that though "the Petitioners had made full disclosure" the "prosecution would not be foreclosed" and in support of that ruling cites authorities, not one of which involved the question whether the Treasury had the power, which it has exercised for more than twenty years, to grant immunity from criminal prosecution to delinquent taxpayers for making voluntary disclosures before investigation (p. 29).

The Petitioners ask an opportunity to present that question to this Court together with the question whether, if the Treasury promise was *ultra vires*, the use of the evidence disclosed in reliance upon it was a denial of due process and a violation of the Petitioners' constitutional immunity from self-incrimination.

Respectfully submitted,

NATHAN L. MILLER,
J. BERTRAM WEGMAN,
Attorneys for Petitioners.

RICHARD J. BURKE,
With them on the Brief.